IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 78-6899

ROBERT FRANKLIN GODFREY,
Petitioner,

vs.

THE STATE OF GEORGIA,
Respondent.

On Writ of Certiorari to the Supreme Court of Georgia

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE WITH BRIEF ATTACHED

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INTEREST OF THE MOVENT

Movent Rayfield Newlon was sentenced to death November 11, 1979, in the Circuit Court of St. Louis County, Missouri, under the Missouri Capital Murder Statute (§565.012.2(7) V.A.M.S.) pursuant to a jury finding of guilt August 3, 1979, and a verdict fixing the punishment at death, returned August 4, 1979, in the following words (Exhibit 2):

> "We the jury, having found the defendant guilty of the capital murder of Mansfield Dave, fix the punishment at

death, and we designate the following aggravating circumstance or circumstances which we find beyond a reasonable doubt:

"Instruction No. 19

"Aggravating circumstance No. 2

"Whether the muder of Mansfield Dave involved depravity of mind and that as a result thereof it was outrageously or wantonly horrible or inhuman."

The Missouri statute (omitting mitigating circumstances as irrelevant) is set out as exhibit 3 hereto.

Newlon's post-trial motions challenged (inter alia) the statute, the instruction, and the verdict as unconstitutionally vague under the due process clause of Amt. XIV, Const. U.S. Movent's notice of appeal to the Missouri Supreme Court, where his appeal is presently pending as docket No. 61, 798, contained a jurisdictional statement asserting such unconstitutionality. Briefs are not yet due.

The jury in movent's trial, second phase, like that in Gates v. Georgia, discussed in petitioner's brief p. 21, made a request for clarification to the trial judge (Exh. 1), reading,

"Please give a definition of 'depravity of mind.' "

In movent's case the request was not answered.

While the *question presented* in this case by its terms raises only the issue of the propriety of the *application* of the statute under the U.S. due process clause, logic demonstrates that any resolution of this question necessarily and implicitly must resolve the question of the constitutionality against due process of the statute itself. The latter is "fairly comprised" in the former. Sup. Ct. Rule 40(d)(1).

Accordingly the principle question on the issue of whether movent lives or dies will be resolved in this case.

QUESTION OF LAW NOT ADEQUATELY PRESENTED

The parties have defined the *question presented* here, and have briefed the case as if this Court, in Gregg v. Georgia 428 U.S. 200, at 291, 96 S. Ct. 2909 at 2938, had decided that this seventh aggravating circumstance of the Georgia statute was constitutional, on its face, against due process; and that only the constitutionality of its application in any case ("so broad"-"open-ended construction") could still be considered.

But this question was not before the Court in *Gregg*, and the short paragraph, which is the predicate for this mistaken interpretation, was concurred in by only *three* of the nine justices. It is not *stare decisis*.

The threshold question of the constitutionality of the statute, which must be resolved before coming to the question of whether it was constitutionally applied, is still open; and is not adequately presented because of a mistaken interpretation of what was said in one of the four opinions in *Gregg*.

COMPLIANCE WITH RULE 42

Council for both parties, Mr. J. Calloway Holmes, Jr., counsel for petitioner and Mr. John W. Dunsmore, counsel for respondent, have both told counsel for movent by telephone that they would consent to the grant of this motion. Written consents will be filed with the Clerk as soon as possible; but because of the lateness of the application, the preparation of the motion will not be delayed pending receipt.

Counsel regrets that he is unable to comply with the time requirements for filing an amicus curiae brief under the rule; the pendency of this case and the nature of the issues presented came to the attention of present counsel for petitioner only on January 4, 1980, when he received through the N.A.A.C.P. Legal Defense Fund, via prior counsel, a copy of petitioner's brief. He has proceeded with the utmost effort since then to ob-

tain the necessary consents and to prepare the motion and the tendered brief.

Wherefore, movent prays that leave be granted him to file the annexed brief as an amicus curiae.

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Attorney for Movent

EXHIBIT 1

SUPPLEMENTAL TRANSCRIPT

Dated: 11 Jan., 1980

FURTHER THEREAFTER, on the 4th day of August, 1979, at the approximate hour of 11:30 a.m., the Defense attorney being present, Mr. Ayers, and the State of Missouri being represented by and through Prosecuting Attorney George Westfall, the following proceedings are conducted in Div. No. 14 St. Louis County Circuit Court, by The Honorable James Ruddy, Presiding Judge, OUTSIDE THE HEARING OF THE MEMBERS OF THE JURY:

* * * * * * * * *

THE COURT: At 11:30 a.m., this note came back from the Jury: "Please give a definition of 'depravity of mind'." Signed, A. Arnold. And I told them that I could not give them any further instructions.

* * * * * * * *

Certification of Certified Court Reporter

I SUSAN J. MASERANG, Official Reporter of Div. No. 14, St. Louis County Circuit Court 21st Judicial Circuit, do hereby certify that this is a true, correct and accurate transcript of my machine-shorthand notes taken at the time and place stated above.

Dated: 11 Jan., 1980

/s/ Susan J. Maserang, CCR
Div. No. 14
St. Louis County Circuit
Court

* * * * * * * *

EXHIBIT 2

We, the jury, having found the defendant guilty of the capital murder of Mansfield Dave, fix the punishment at death, and we designate the following aggravating circumstance or circumstances which we find beyond a reasonable doubt:

Instruction No. 19

Aggravating Circumstance No. 2

Whether the muder of Mansfield Dave involved depravity of mind and that as a result thereof it was outrageously or wantonly horrible or inhuman.

/s/Amos Arnold

Filed: Aug. 4, 1979

State of Missouri
County of St. Louis ss

I, Raymond V. Clifford, Circuit Clerk, within and for the County and State aforesaid, certify the above to be a full, true and complete copy of the verdict in the above entitled cause, as fully as the same appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at office in the City of Clayton, Missouri this 11 day of January, 1980.

Raymond V. Clifford
Circuit Clerk
By Eileen A. Gorke
Deputy Clerk

(Seal)

EXHIBIT 3

556.012. Evidence to be considered in assessing punishment in capital murder cases.—1. In all cases of capital murder for which the death penalty is authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider:

(1) Any of the statutory aggraving circumstances enumerated in subsection 2 which may be supported by the evidence,

(2) Any of the statutory mitigating circumstances enumerated in subsection 3 which may be supported by the evidence,

(3) Any mitigating or aggravating circumstances otherwise authorized by law and

(4) Whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death or whether a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found to exist.

2. Statutory aggravating circumstances shall be limited to the following:

(1) The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions;

(2) The offense was committed while the offender was engaged in the commission of another capital murder;

(3) The offender by his act of capital murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of capital murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The capital murder was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit capital murder or committed capital murder as an agent or employee of another person;

(7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The capital murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duty;

(9) The capital murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The capital murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

* * * * * * *

4. The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt.

5. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed.

(L.1977 H.B 90 § 5)
Effective 5-26-77

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BRIEF OF AMICUS CURIAE

TABLE OF AUTHORITIES

A. INTEREST OF AMICUS

The interest of the amicus curiae in this case is as stated in the motion for leave to file this brief, supra.

B. ARGUMENT

The Georgia statutory aggravating circumstance under which Godfrey is sentenced to death is identical (so far as relevant to either case) to the Missouri statutory aggravating circumstances under which Newlon, the amicus, is sentenced to death. A decision here having the effect of upholding the facial constitutionality of the statutes against due process would control this issue in both cases.

The "question presented", as stated in the petition and briefs, by its terms raises only the question of whether the *application* of the statute was too broad and too vague. But a resolution of that question necessarily involves the resolution of the preliminary question of whether the statute, however applied, is constitutional. If the clause is unconstitutional, the question of whether it was constitutionally applied is *a fortiori* moot. Therefore a decision one way or the other on the propriety of its application would implicitly hold the statute constitutional.

Supreme Court rule 40(d)(1) provides,

> "The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein"

Accordingly the question presented by this certiorari necessarily includes the question of the facial validity of the statute itself. Can we imagine this Court's saying, "We pass the question of the constitutionality of the statute as not before us under the question presented, and we hold the application of the statute to the facts in the case is not overbroad" (or is "overbroad")?

The parties have defined the question presented and briefed the case as if Gregg v. Georgia had decided, once for all, that this aggravating circumstance is constitutional on its face, if only the application of it is not too broad or "open ended", following the language of the paragraph in Gregg at 428 U.S. 201, 96 S. Ct. 2938.

This is a mistake. No such decision was made in Gregg, for two reasons: a) the question discussed was *coram non judice*, and b) what was said on this subject in *Gregg* was said by far less than a majority of the court—not even a plurality.

The jury in Gregg's case had not found the existence of this aggravating circumstance. As pointed out in the syllabus, the jury found that two of the three aggravating circumstances existed, but declined to find that the murder was, "outrageously and wantonly vile, horrible and inhuman" in that it "involved the depravity of (the) mind of the defendant." Syllabus 96 S.Ct. 2909, 2915. See also opinion of Mr. Justice White, 428 U.S. 222, 218, 96 S.Ct. 2909, 2946:

> "The jury returned the death penalty on all four counts finding all the aggravating circumstances submitted to it, *except that it did not find the crimes to have been 'outrageously or wantonly vile,' etc.*" Italics added.

The judicial power of this Court, like that of all the courts of the United States, is limited to the cases and controversies enumerated in U.S. Constitution, Art. III, Sec. 2. What this Court, or any federal court, may say on any issue which is not before it can, under the constitutional provision, have no judicial effect.

> " The judicial power does not extend to the determination of abstract questions." Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 324, 56 S. Ct. 466, 472.

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may

> present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues.
>
> 349 U.S. 70, 74, 75 S. Ct. 614, 616 Rice v. Sioux City Mem. Pk. Cemetery
>
> "We do not sit, however, 'to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . .'."
>
> Thorpe v. Housing Authority, 393 U.S. 268, 284, 89 S. Ct. 518, 527

Clearly what was said about the seventh aggravating circumstance in *Gregg* was said by-the-by, an obiter dictum, a thin law review article, and not as a step toward the resolution of a case or controversy. It was without effect in Gregg's case, and it is without effect as a precedent.

Secondly, what was said in the Gregg opinions at 1.c U.S. 201, S. Ct. 2938, about "the seventh statutory aggravating circumstance", was said in the opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens—just one-third of the Court. Nothing like this statement appears in the opinion of Mr. Justice White, in which the Chief Justice and Mr. Justice Rehnquist joined. Of course, the dissents of Mr. Justice Brennan and Mr. Justice Marshall (428 U.S. 227 and 231, 96 S. Ct. 2871 and 2973) contain no such statement. Even the language of the Stewart, J., opinion is hedged by the foot-note that all the then known death judgments under the seventh aggravating circumstance also included a finding of another factual aggravating circumstance (as did even the McCorquodale decision - viz. torture).

Thus, the constitutionality against due process of the seventh aggravating circumstance *on its face*, rather than as "too broad-

ly construed," is an open question in this Court, and its constitutionality must be decided first, before the constitutionality of its *application* can be reached.

We now turn to the issue itself.

An examination of the aggravating circumstances in the Georgia statute (as in the Missouri statute) reveals that all the statutory circumstances *but one* deal with factual events: prior record, in the course of burglary or arson, in a public place and danger to more than one person, to obtain money, etc., etc. All these criteria are capable of application to the *facts* brought forward at the trial. Whatever may be said about the whole statutory scheme, it cannot reasonably be said that these other circumstances are unconstitutionally vague.

But except for the element of "torture" (in both statutes) and "aggravated battery" (in the Georgia statute)—neither of which was found in either case—the seventh circumstance is an "omnium gatherum", a circus tent which will cover any murder, and which seeks to bring the law back to where it was before Furman. If the jury finds that the murder was "bad", the defendant is executed.

For the criteria (sans torture and battery) of the seventh aggravating circumstance are all *subjective*, i.e. they deal with the reaction of jurors and judges to the circumstances of the crime, and not with the factual circumstances themselves.

Leaving out the torture and aggravated battery elements as not involved here, the statute authorized a judgment of death if:

> "The offense was outrageously or wantonly vile, horrible or inhuman in that it involved—depravity of mind."

We append a little glossary of the statutory terms as defined in Webster's New Collegiate Dictionary, G. & C. Merriam Co., 1961.

Outrage: (1) Extravagant or violent misdoing; wrong done to persons or things.

Wanton: (1) Orig., undisciplined; unruly. (4) Marked by arrogant recklessness of justice, of the feelings of others, or the like.

Vile: (2) Morally base, wicked, sinful — (4) Loosely, objectionable for any reason; bad; as vile weather.

Horrible: Exciting, or tending to excite, horror; dreadful; shocking.

Horror: A painful emotion of fear, dread and abhorrence; great aversion and repugnance.

Inhuman: (1) Destitute of human or humane feeling; cruel; brutish. (2) Unlike what is normally human; nonhuman.

Humane: (1) Having feelings and inclinations creditable to man; kind; benevolent.

Depravity: (1) State of being depraved; corruption.

Depraved: Characterized by corruption; esp. perverted, evil.

Corruption: (1) A corrupting, or state of being corrupt; as (a) Decay (b) Depravity; impurity (c) Bribery.

Corrupt: (2) Changed from a state of uprightness, correctness, truth, etc., to a bad state; depraved.

Every one of these words deals not with facts, but with emotions—the subjective emotional responses of people made aware of facts. The problem is: Whose responses are to govern? For what is depravity of mind to one may be deprivation of upbringing to another—a bull fight may be a drama to you, but horrible to me. So it goes. These pejorative words define nothing. Wickedness, like beauty, is in the eye of the beholder. This is the type of vague standards constitutionally impermissible under all the decisions.

In Cramp v. Board of Public Instruction, etc., 368 U.S. 285, 287, 82 S. Ct. 275, 280 (1961) the Supreme Court held:

> "We think this case demonstrably falls within the compass of those decisions of the Court which hold that '* * * a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.' Connally v. General Construction Co., 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L.Ed. 322. 'No one may be required at peril of life, liberty or property to speculate as the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' Lanzetta v. State of New Jersey, 306 U.S. 451, 453, 59 S. Ct. 618, 619, 83 L.Ed. 888. 'Words which are vague and fluid * * * may be as much of a trap for the innocent as the ancient laws of Caligula.' United States v. Cardiff, 344 U.S. 174, 176, 73 S. Ct. 189, 190, 97 L.Ed. 200. 'In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all.' Champlin Refining Co. v. Corporation Commission of Oklahoma, 286 U.S. 210, 243, 52 S. Ct. 559, 568, 76 L.Ed. 1062."

And in Grayned v. City of Rockford, 408 U.S. 106, 108, 92 S. Ct. 2294, 2298, the Supreme Court held:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person

> of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

The words used are impermissibly vague, certainly, but what about the syntax? What is meant by the phrase "in that it involved depravity of mind"?

Does this mean that if a crime "involved" depravity of mind, it is *ipso facto* vile, horrible or inhuman? Or did the legislature mean that the jury must find vile, horrible or inhuman, and also depravity of mind? Or as the Georgia courts held in this case, does a finding of vile, horrible *and* inhuman constitute a finding of depravity of mind?

What is meant by "involved", anyway? Could the "depravity of mind" of an accomplice charged in a murder be the criterion for the defendant's death sentence? The statute does not require depravity of *defendant's* mind. It requires only that the depravity of *someone's* mind be "involved" in the crime. In the Gates case the trial judge held that it meant the *victim's* mind! Petitioner's Br. p. 21.

Note also the double disjunctive: "Outrageously or wantonly", and "vile, horrible or inhuman." There are six possibilities under the criterion: outrageously horrible, wantonly horrible, outrageously inhuman, wantonly inhuman, outrageously vile and wantonly vile.

Something for everybody.

These difficulties of language, however inscrutable they may seem, pale beside the central difficulty of comprehending what is meant by "depravity of mind". Apart from the problem of *whose mind* must be depraved and how the depraved mind must be *involved*, we are at a loss to comprehend what the legislatures meant by the word "depravity".

All the dictionaries we have consulted—Websters, Century, Oxford English—define depravity in terms of corruption or wickedness. Corruption is frequently defined in terms of depravity, explaining in a circle. The Century illustrates with a quotation from Macauley, "Machiavelli",

> "Succeeding generations change the fashion of their morals, . . . wonder at the depravity of their ancestors."

No matter how you slice this statutory aggravating circumstance it says only one thing over and over: bad, bad, bad.

If the crime is a bad one you can sentence the man to death.

Not many juries have the nerve to ask the trial judge what his instructions mean. It is of the most penetrating significance that two juries, one in Florida (Gates) and one in Missouri (Newlon) should ask the judge what he meant by "depravity of mind". Exhibit 1. Yet both sentenced the defendants to death by finding depravity. In Godfrey's case it is simply ignored.

Furman, where are you now?

C. CONCLUSION

The conviction must be reversed.

Respectfully submitted,

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